Filed 3/16/09 P. v. Avendano CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DIEGO AVENDANO, Defendant and Appellant.	B204023 (Los Angeles County Super. Ct. No. TA080592)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary R. Hahn, Judge. Affirmed as Modified.

Tracy J. Dressner, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

Diego Avendano appeals from the judgment entered after the jury convicted him of murder (Pen. Code, § 187, subd. (a); counts 1, 2)[1] and premeditated attempted murder (§ 664/187, subd. (a); count 3) and found true the multiple murder allegation (§ 190.2, subd. (a)(3)) and, as to all three offenses, the gang (§ 186.22, subd. (b)(1)(A)) and firearm (§ 12022.53, subds. (b), (c), (d) & (e)) allegations. He was sentenced to prison on each of counts 1 and 2 for life without possibility of parole, plus a consecutive term of 25 years to life for a firearm enhancement, and on count 3 for life with the possibility of parole with a 15-year minimum parole eligibility term for the gang enhancement.

Defendant contends that after the verdicts but before sentencing, he was deprived of a full competency hearing in that the trial court abused its discretion by refusing to appoint a third expert as a "tie-breaker" after two experts reached diametrically opposed opinions as to his competency. He alternatively contends the preponderance of the evidence demonstrates he was incompetent. He also contends the court erred in imposing a stayed parole revocation fine in view of his sentences of life without possibility of parole.

We find merit only in defendant's claim that no parole revocation fine is proper. The recital of a $10,000 stayed parole revocation fine therefore must be stricken from the September 21, 2007 minute order. Also, the trial court neglected to pronounce sentence on the lesser firearm enhancements on count 3 (§ 12022.53, subds. (b) & (c)). We therefore order the judgment modified, and an amended

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[1] All further section references are to the Penal Code.

abstract of judgment prepared, to reflect that those enhancements are imposed and stayed.[2] As modified, we affirm the judgment.

BACKGROUND

Defendant's murder and attempted premeditated murder convictions arose from a gang-related retaliation drive-by shooting by the Watts Varrio Grape Street (Grape Street) gang members against members of the rival Killen Mob (K-Mob) gang.

On December 2, 2004, K-Mob gang members Nazario Mejia, Neftali Pineda, his younger brother, and Arturo Quezada were "hanging out" at 115th Street and Wilmington Avenue when a car stopped nearby. The occupants called out "Grape Street" and "F--k K-Mob," and Mejia yelled back, "F--k Grape Street." Mejia and his "homies" jumped into a car and followed as the other vehicle drove off. After losing sight of the target car several minutes later, the three drove around for about five minutes, crossed out Grape Street graffiti, and put up K-Mob graffiti, including "187," which meant murder and a threat. The crossing out of

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[2] "[A]fter a trial court imposes punishment for the section 12022.53 firearm enhancement with the longest term of imprisonment, the remaining section 12022.53 firearm enhancements . . . that were found true for the same crime must be imposed and then stayed." (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1122-1123.) On count 3, the trial court inadvertently failed to impose and stay the lesser firearm enhancements (§ 12022.53, subds. (b) & (c)) after imposing the greater (§ 12022.53, subd. (d).) This was unauthorized sentencing error. A sentence is "unauthorized" where it could not be lawfully imposed under any circumstance in the case. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) Accordingly, an unauthorized sentence "is subject to judicial correction whenever the error comes to the attention of the reviewing court. [Citations.]" (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn 6.)

gang graffiti is a sign of disrespect that could lead to violence. Grape Street would benefit if its members found and killed the individuals who crossed-out its graffiti.

Quezada then drove Mejia and Pineda to their home. Before the latter could exit, the other car came from behind and pulled up to the driver's side of Quezada's car. Mejia noticed the front passenger window roll down about halfway and saw defendant, whom he recognized as a Grape Street member, pull out a gun. Mejia ducked after the first shot and heard a total of nine shots. Pineda and Quezada died from multiple gunshot wounds. Mejia was not wounded.

On December 6, 2004, after her arrest on an unrelated matter, Jeanette Hernandez, a Grape Street gang member, informed police defendant told her he committed the murders and threatened to kill her if she told anyone.

On May 24, 2005, a deputy sheriff recovered from defendant a piece of paper which contained the statement "they got me for two murder[s] today that I did f[--]king do" and was signed at the bottom with defendant's gang moniker.

At trial, defendant denied any involvement in the murders or that he told Hernandez he committed the murders. He explained he meant to write he "didn't" murder anyone rather than writing he "did."

DISCUSSION

1. *Competency Issues*

a. *Standard of Review*

A defendant "cannot be tried or adjudged to punishment while that person is mentally incompetent." (§ 1367, subd. (a).) "Both the due process clause of the Fourteenth Amendment to the United States Constitution and state law prohibit the state from trying or convicting a criminal defendant while he or she is mentally incompetent. [Citations.] A defendant is incompetent to stand trial if he or she lacks '"a sufficient present ability to consult with his lawyer with a reasonable

degree of rational understanding--and . . . a rational as well as a factual understanding of the proceedings against him.'" [Citations.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 846-847 (*Rogers*).)

"The court's duty to conduct a competency hearing may arise at any time prior to judgment. [Citations.] Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations." (*Rogers, supra*, 39 Cal.4th at p. 847.) "More is required than just bizarre actions or statements by the defendant to raise a doubt of competency." (*People v. Marshall* (1997) 15 Cal.4th 1, 33.) "Evidence regarding past events that does no more than form the basis for speculation regarding possible current incompetence is not sufficient." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1281.)

"A trial court may appropriately take into account its own observations in determining whether the defendant's mental state has significantly changed during the course of trial. [Citation.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 136 (*Lawley*).) "A defendant is presumed competent unless the contrary is proven by a preponderance of the evidence. [Citations.] On appeal, the reviewing court determines whether substantial evidence, viewed in the light most favorable to the verdict, supports the trial court's finding. [Citation.] 'Evidence is substantial if it is reasonable, credible and of solid value.' [Citation.]" (*Lawley, supra*, 27 Cal.4th at p. 131, accord, *People v. Dunkle* (2005) 36 Cal.4th 861, 885.)

b. *Competency Hearing*

On March 23, 2006, the jury returned its verdict. On April 18, 2006, before sentencing, Samuel M. Weiss was substituted as defendant's counsel of record. Wayne Higgins, his associate, later also appeared on defendant's behalf.

On September 12, 2006, defense counsel declared a doubt as to defendant's mental competence. The trial court adjourned the criminal proceedings and set the

matter for hearing (§ 1368). On January 25, 2007, the court noted it had received a copy of the report of Raymond E. Anderson, Ph.D., a psychologist, submitted by the defense. In response to the prosecutor's request, the court appointed Dr. Kaushal Sharma, a psychiatrist, to interview defendant.

Dr. Anderson and Dr. Sharma reached contradictory conclusions regarding defendant's competence in their respective reports. Dr. Anderson opined defendant's verbal productions are rambling and "replete with obvious breaks or gaps in syntax or sequence. Often thoughts intrude into his consciousness and he feels compelled to express them. He frequently changes the subject." He also opined that "[i]t appears that he suffers from auditory hallucinations." He concluded that "[b]asically, he is simply too confused to appear at appointments, make out forms, call for information or otherwise meet his responsibilities without assistance. He appears, in fact, to be totally bereft of any useful organizational ability."

By contrast, Dr. Sharma opined defendant "does not suffer from any identifiable mental disorder" and "defendant in my interview was willfully, consciously and intentionally trying to present himself as mentally ill. The defendant is malingering mental illness and incompetency at this time." Dr. Sharma explained his opinion was based mostly on defendant's presentation during a jail interview. For instance, when shown a pen and asked what it was, defendant replied it was a "steak." He identified Dr. Sharma's reading glasses as "T.V." Dr. Sharma noted defendant wore "clean clothes and he had a beard and appeared to be well groomed and well fed with no signs of malnutrition."

Dr. Sharma also considered information from a school document and several transcripts that contradicted defendant's interview statements. He opined defendant, who received a "B in English in the 11th grade[,] would be expected to spell his own name," but in the interview, defendant claimed he did not know how.

He also opined defendant, who had an "A+ in Science in the 11th grade [should] know how many legs a dog has and whether a fly or elephant is bigger." Defendant stated a dog had three legs and he denied knowing what an elephant was. In one transcript, defendant responded to a question by stating "he was making a right turn," but in the interview he denied knowing what "right" or "left" meant. Dr. Sharma found defendant's denial that he had gone to school was contradicted by his statement he was going to school and information he gave about his school in his transcribed interview with Detective Skaggs.

Dr. Sharma stated "in 2004, as well as in 2006, as well as in the interview with the detective, [defendant] responded to questions in a meaningful fashion, he provided answers even if untrue, they were relevant to the questions posed. No bizarreness was described and no behavior was described that would suggest mental illness."

On September 21, 2007, after the reports of Dr. Anderson and Dr. Sharma were marked for identification, Mr. Weiss requested the court appoint a third doctor for "a clearer opinion," because "one doctor is completely opposite in his opinion to the other doctor" and "there are different sets of facts and different circumstances here." In denying the request, the court explained it had "dealt with two opinions before" and stated it would do so in this instance.

The parties stipulated that the defense could rely on the report of Dr. Anderson, who was unavailable at that time.

Dr. Sharma testified that after interviewing defendant, he opined defendant was "intentionally, willfully, and consciously trying to present himself as if he was mentally ill and as if he was mentally incompetent." He explained if the statements defendant made were true and really reflected "his mental capacity, [Dr. Sharma] would expect him to be [lying] in a nursing home . . . wearing a diaper [and] requiring spoon feeding." He added that defendant's statements were

"profoundly inconsistent" "with the school records and the transcripts and the prior tapes that [Dr. Sharma] had reviewed." In Dr. Sharma's opinion, defendant was "malingering incompetency and the mental illness."

Dr. Sharma testified his "opinion would be . . . exactly the same as it is right now" even if he had all the information provided in Mr. Weiss's hypothetical, i.e., defendant had had meningitis; "he had been shot three years prior"; "he had his head completely cut open and had surgery on his head"; "he had his lung taken out"; and "he had all type of other medical problems."

He further testified: "It appears to me, and I'm very strong in my opinion, that [defendant] is a fake." He explained "[m]eningitis does not cause a person to not know which side is left or right" and that if defendant were so "bad that he does not know which side is left or right, meningitis or not," "[h]e would not be able to eat, take a shower, or shave his face," and thus, he would not have been able to stay in his jail module, which did not have room service.

Mr. Weiss renewed his motion for appointment of a third doctor based on Dr. Sharma's testimony, which "was not a thorough evaluation of the defendant." He argued Dr. Sharma should have at least read Dr. Anderson's report and should have returned the family's phone calls. The court took the request under submission.

Kelvin Moody, a Los Angeles deputy sheriff, testified he worked in the mental observation unit which housed defendant. Moody noted defendant appeared to be competent and communicated well. He did not observe any bizarre behavior. A few weeks earlier, defendant asked for a razor, because he was going to court the next day. The following day, defendant, who was shaven, did appear in court. About a week later, defendant told Moody he had recognized him in court and believed "there was some type of issue between [them], because [Moody] was testifying in court." After Moody explained he was just doing his

job, defendant stated he understood. When asked if defendant had any trouble understanding what was being discussed, Moody responded defendant "understood everything he said" and "communicated well."

Mr. Weiss argued Dr. Sharma's evaluation of defendant was incomplete, because he did not have the information defendant's twin sister and his sister-in-law would have provided, and he did not consider the information in Dr. Anderson's report. He further argued Dr. Sharma merely conducted "maybe a half-hour conversation" with defendant and his opinion was not based on "psychological tests, nothing." He requested the court find defendant incompetent at this point or appoint another psychiatrist with input from the family.

The prosecutor responded defendant was "competent, coherent, organized [as to] times and place and operating coherently." He pointed out Dr. Sharma found defendant to be malingering and a "faker."

Mr. Weiss and Mr. Higgins each announced his belief that defendant was incompetent based on his interaction with defendant in jail. Mr. Higgins argued "another medical examination is needed to end this dispute" regarding defendant's competency. The prosecutor responded "the court will make the final determination in terms of a tie breaker issue. It's the court's determination."

The trial court found defendant was competent.[3] In rejecting Dr. Anderson's contrary opinion, the court pointed out Dr. Sharma indicated that in 11th grade

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[3] Although the trial court did not expressly rule on the renewed request for appointment of a third expert, which the court had taken under submission, it implicitly denied the request when it ruled on the competency issue. In any event, defendant's failure to secure an express ruling forfeited any claim of error in this regard. (See, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 827 ["Because no ruling was actually made below, 'no review can be conducted here.' (*People v. Rowland* (1992) 4 Cal.4th 238, 259; *People v. McPeters* (1992) 2 Cal.4th 1148, 1179 'the absence of an adverse ruling precludes any appellate challenge'].)"].)

defendant received a "B" in English and an "A Plus" in science, which facts contradicted Dr. Anderson's indication defendant "did very bad" in the "10th, 11th grades." The court also found unpersuasive Dr. Anderson's opinion that defendant was incompetent, "[b]ecause he is simply too confused to appear at appointments, make out forms, confirmation or otherwise meet responsibilities without assistance. He appears in fact to be totally without useful organizational ability." The court found these conclusions were contradicted by Moody's testimony that defendant recognized Moody at the last court hearing and about a week ago conversed with Moody without any "problems with what he was talking about or understanding what was going on."

c. *Refusal to Appoint Third Expert Not Abuse*

Defendant contends he was denied a full competency hearing, because the trial court abused its discretion in refusing to appoint a third expert to break the tie between the two conflicting experts, one who found he was competent and the other who found he was incompetent. There was no abuse.

Defendant "acknowledges that the court in *Lawley, supra,* held that deciding competency based on two conflicting doctors' reports does not deprive a defendant of . . . a full competency hearing." He points out that "*Lawley,* however, did not hold that a trial court never has to appoint a third examiner" and is factually distinguishable, because "[a]t no time did the defense request that a third doctor examine the defendant."

He argues in this instance, "counsel clearly and repeatedly asked for the appointment of a third expert," and "[n]ot only were the reports in [this] case not nearly as thorough as the reports in *Lawley,* . . . the two reports [here]

fundamentally disagreed about whether [defendant] even suffered from a mental disorder or [he] was simply a malingerer." Defendant concedes "Dr. Anderson's report could have been more thorough," but argues "it was infinitely more illuminating than Dr. Sharma's conclusion based solely on one interview with [defendant]." He points out "Dr. Anderson interviewed [defendant]'s twin sister, learned about [his] family, educational, and medical history" while "Dr. Sharma was not only unaware that [defendant] had a twin sister, but he had no knowledge of [defendant]'s childhood cerebral meningitis or his traumatic brain injury suffered as an adult after being shot repeatedly."

The trial court did not abuse its discretion in declining to appoint a third expert to examine defendant regarding his competency. (See, e.g., *People v. Carmony* (2004) 33 Cal.4th 367, 377 ["[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it"].) The court observed defendant during his trial, including his testimony. Based on these observations, the court thus was in a proper position to judge which of the two conflicting opinions regarding defendant's competency in the dueling reports to credit.[4]

At trial, defendant denied he was a good student and testified he "used to get nothing but F's" in school. Although he denied knowing how to write, he admitted writing the recovered document in which he admitted he "did" commit the two murders. It was in this context that the trial court found credible Dr. Sharma's

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[4] Only the reports of Drs. Sharma and Anderson were before the court at the time defendant's request for a third expert was denied. (See *People v. Welch* (1999) 20 Cal.4th 701, 739 ["We review the correctness of the trial court's ruling at the time it was made, . . . not by reference to evidence produced at a later date"]; see also, *People v. Panah* (2005) 35 Cal.4th 395, 434, fn 10 ["We do not review the propriety of the trial court's competency ruling based on evidence that was not presented to it at the time it made that ruling"].)

opinion defendant was malingering rather than incompetent because defendant's good grades in the 11th grade belied his claims of ignorance. During the interview, defendant denied knowing how to spell his own name, but, as Dr. Sharma noted, he had received a "B" in English. Similarly, defendant's "A+" in science renders preposterous defendant's statement a dog has three legs and his claim he did not know what an elephant was.

A contrary conclusion is not compelled by reason that Dr. Sharma did not review Dr. Anderson's report, interview defendant's family members prior to rendering his own report, or take into consideration any medication defendant was taking. None of these matters informed on defendant's *current* competence.

Defendant's history and background in Dr. Anderson's report was based mostly on what defendant's sister related, i.e., defendant's cerebral meningitis he suffered as a child; his "very bad grades" in school; his inability to work; a prior incident where defendant was shot multiple times, including in his head; and the surgical reduction of his lungs due to that trauma.

Dr. Anderson opined "[t]he *likelihood* is high that [defendant] *may* suffer from . . . Mild Mental Retardation," which retardation "*can* be associated with Cerebral Meningitis," and "the *likelihood* is high that his psychotic condition [, which is *not* a 'Psychosis Due to a General Medical Condition,'] is due to one or both of" defendant's suffering "from Cerebral Meningitis as a child and [being] subjected to a serious traumatic brain injury as an adult." (Italics added.) Dr. Anderson, however, did not opine such psychotic condition was in fact caused by either or both, nor did he opine defendant suffered from mental retardation. He did opine defendant's performance during the interview was "negatively affected by his mental confusion whether he is taking appropriate medication *or not*." (Italics added.)

d. *Insufficient Evidence of Incompetency Presented*

Defendant contends the judgment must be reversed, because he demonstrated by the preponderance of the evidence that he was incompetent. We disagree.

As demonstrated above, Dr. Anderson's opinion that defendant was incompetent was not credited by the trial court. In finding defendant was competent, the court was entitled rely on its own observations of defendant during trial and to credit Dr. Sharma's report and the hearing testimony of Dr. Sharma and Moody, which contradicted the relevant matters set forth in Dr. Anderson's report regarding defendant's competency. (See, e.g., *Lawley, supra*, 27 Cal.4th at p. 131; *People v. Dunkle, supra*, 36 Cal.4th at p. 885; see also, *People v. Hayes, supra*, 21 Cal.4th at p. 1282 [defendant's trial participation "demonstrate[s] beyond any doubt that he was fully aware of the nature of the proceedings and able to assist counsel"]; *People v. Panah, supra,* 35 Cal.4th at pp. 433-434.)

2. *Striking of Stayed Parole Revocation Fine Mandated*

Defendant contends the trial court erred in imposing the $10,000 stayed parole revocation fine. We agree this fine must be stricken but for a different reason: the court's minutes recite such a fine was imposed but the court did not in fact impose the fine.

A parole revocation fine cannot be imposed where, as here, a defendant is sentenced to life without possibility of parole. (*People v. Petznick* (2003) 114 Cal.App.4th 663, 687; *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.) At the sentencing hearing, the trial court expressly ruled no parole revocation fine would be imposed in view of defendant's life without possibility of parole sentences. In contrast, the September 21, 2007 minute order and the abstract of

judgment each reflects the trial court imposed a $10,000 parole revocation fine and then stayed the fine.

"Entering a judgment of the trial court in the minutes is a clerical function. Any discrepancy between the minutes and the oral pronouncement of a sentence is presumed to be the result of clerical error. Thus, the oral pronouncement of sentence prevails in cases where it deviates from that recorded in the minutes. (See *People v. Mesa* (1975) 14 Cal.3d 466, 471-472.)" (*People v. Price* (2004) 120 Cal.App.4th 224, 242.) Moreover, "[i]t is, of course, important that courts correct errors and omissions in abstracts of judgment. An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

We therefore remand the matter and direct the superior court to prepare an amended abstract of judgment without reference to a $10,000 stayed parole revocation fine.

DISPOSITION

The judgment is modified to reflect: (1) as to count 3, the lesser firearm enhancements (§ 12022.53, subds. (b) & (c)) are imposed and stayed, and (2) to delete the $10,000 parole revocation fine. As modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment reflecting these changes and to forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.